

Leanne M. Schraudner
Schraudner & Hillier, PLLC
3825 Valley Commons Drive, Ste. 5
Bozeman, MT, 59718
Ph: (406) 586-1643
Fax: (406) 522-5394
email: lschraudner@bridgeband.com

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Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

*Attorney for Appellees Wallace C. Walker
and Rana Rae Walker*

**IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No. DA 09-0487**

VALERIE EMMERSON,

Petitioner and Appellant,

v.

WALLACE C. WALKER and RANA
RAE WALKER,

Respondents and Appellees.

WALLACE C. WALKER AND RANA
RAE WALKER,

Third-Party Plaintiffs, Appellees,
and Cross-Appellants,

v.

S. TUCKER JOHNSON,

Third-Party Defendant and
Appellant.

**APPELLEES WALKERS'
BRIEF IN RESPONSE TO
MOTION TO STRIKE**

This brief, submitted under Rule 16(2), M.R.Civ.P, responds to Appellant Johnson's motion to strike Appellees Walkers' reply brief. The reply brief was filed in support of Walkers' cross-appeal of the district court's decision to deny Walkers' claim against Johnson for punitive damages. Johnson takes issue with Part I of the reply brief (pp. 2-11) which addresses Johnson's claim that he could not have induced Emmerson's breach of contract because there was no such breach. Johnson argues that Walkers' Part I arguments are "unrelated to their cross appeal." (Motion to Strike, p. 2). Johnson is wrong. For the reasons stated below, Walkers request that this Court deny the motion to strike.

The issues addressed in Part I of Walker's reply—whether Emmerson breached the Walker/Emmerson exchange agreement and whether Johnson induced that breach—are inextricably tied to Walkers' punitive damages cross appeal. Emmerson's breach of the agreement was a wrongful act. Walkers contend in their cross appeal that Johnson intentionally aimed to induce Emmerson to commit the breach. They believe that Johnson's conduct precipitating the breach, together with his other acts after the breach occurred, demonstrate the actual malice required under the punitive damages statute. *See* Mont. Code Ann. §27-1-221(2).

The gist of Walkers' cross appeal is that the district court's findings and conclusions amply justify punitive damages and that the lower court erred in not awarding them. Johnson's contention that there was no contract breach is an effort to chip away at those findings and conclusions that, in Walkers' view, justify a punitive damages award. He attempts to eliminate liability for compensatory and

punitive damages by arguing that there was no contract breach and thus no wrongful conduct. Establishing that Johnson induced a wrongful breach of contract, though not necessary to prove tortious interference,¹ is important under this case's facts to prove actual malice for punitive damages. In short, the issues surrounding the inducement and breach are part and parcel of Walkers' cross appeal for punitive damages.

In making his motion to strike, Johnson employs overly-technical and somewhat disingenuous readings of prior briefs in his efforts to distinguish between arguments relating to his appeal and those pertaining to Walkers' cross appeal. He states, for example, that "in their cross appeal, the Walkers merely stated—without any citation to the record—that Johnson induced a breach of the Walker/Emmerson Exchange Agreement." (Johnson Motion to Strike, pp. 2-3). That is simply not true. Walkers dedicated about 10 pages of their opening brief to discussing Emmerson's material breach of the exchange agreement, and they carefully documented Johnson's conduct that induced that breach. (Walker's Opening Br., pp. 18-28). But Johnson ignores those pages, instead choosing to cite only the content of Walker's opening brief that was placed under a "punitive damages" heading (*See, id.* at pp. 42-26). Walkers are not required to segregate their opening brief into essentially two briefs, one responding to Johnson's appeal and the other supporting their cross appeal, nor must they repeat facts and other content under each argument heading. The rules don't require such exactitude. To the contrary, Rule 12(4), Mont. R. App. P., mandates that "[t]he cross-appellant

¹ See Walker's Opening Br., pp. 33-34

shall file the cross-appeal brief *combined in a single document* with the answer brief....” (emphasis added).

Even if Johnson were correct and a case could be made that appeal and cross-appeal arguments have been impermissibly blurred, the fault for that lies with Johnson, not with Walkers. Johnson claims his discussion of contract breach in his reply brief was “strictly confined to issues raised in Johnson’s appeal—not issues raised in Walkers’ cross-appeal.” (Johnson Motion to Strike, pp. 3). That is incorrect. Johnson presented two *new* arguments in his reply brief: (i) Emmerson could not have breached the exchange agreement because the district court enforced it (Johnson Reply Br., pp. 4-6); and (ii) Emmerson’s filing of a declaratory judgment action somehow suspended her obligation to perform. (*Id.*, pp. 7-8). Johnson made both of these arguments *for the first time* in his reply brief. There is no hint of these arguments in his opening brief.²

By presenting two new arguments in his reply brief, Johnson opened the door for Walkers’ response to these arguments. Walkers were justified in construing these new arguments as being responsive to their cross appeal on punitive damages. Part I.A of Walkers’ Reply Brief (pp. 2-6), the part that Johnson takes exception to, is dedicated almost entirely to replying to cross-appellee Johnson’s new arguments. Under these circumstances Part 1 is well within the bounds allowable for a reply brief on Walkers cross appeal. *See United States v Rodriguez* (1994, CA5 Tex) 15 F3d 408, 414 n.7 (“Although a reply brief is not mandatory, ... it is the best vehicle for narrowing the true issues, and is *especially important*—

² In his opening brief Johnson summarily asserted that Emmerson did not breach the Walker/Emmerson Exchange Agreement (Johnson Opening Br., pp. 13, 37 n.4); he made no argument and cited no law in support of that conclusion.

and called for—when a new point or issue ... is raised in the appellee's brief. (emphasis added)). Johnson's motion to strike smacks of unfairness; if granted it would allow him to present two new arguments without affording Walkers any opportunity to reply.

Finally, Johnson claims that Walkers raised new matters in their reply brief. He provides a paragraph of authority (Motion to Strike, p. 3) for the well-settled principle, embodied in Rule 12(3), Mont. R. Civ. P., that a reply brief must be confined to new matter raised by the other party. He takes a shotgun blast at the entirety of Part I of Walkers' reply, but he does not specifically identify the alleged impermissible matter—*i.e.*, matter not raised in Walkers' opening brief. As described above, issues surrounding Emmerson's breach of contract and Johnson's inducement of that breach were extensively briefed in Walkers' opening brief. The further discussion of those matters in Walkers' reply is well within the field delimited by the opening brief's arguments, differing only to the extent necessary to address the new arguments raised in Johnson's reply and response brief.


Johnson's motion to strike is procedurally flawed,³ but more importantly the motion has no merit. The remedy sought, striking Walkers' reply, would be fundamentally unfair to them. For the reasons set forth above, the Walkers respectfully request that this Court deny Johnson's motion to strike and proceed to decide this appeal on its merits.

³Rule 16(1), Mont. R. Civ. P., requires that the movant contact opposing counsel concerning the motion and state in the motion whether opposing counsel objects. Johnson's counsel did not comply with either of these requirements. Under Rule 16(c), such failure may be grounds for this Court's denial of the motion.

RESPECTFULLY SUBMITTED: May 18, 2010

Schraudner & Hillier, PLLC
3825 Valley Commons Dr., Ste. 5
Bozeman, MT 59718
(406) 586-1643

By:


Leanne M. Schraudner

*Attorney for Appellees Wallace C. Walker
and Rana Rae Walker*

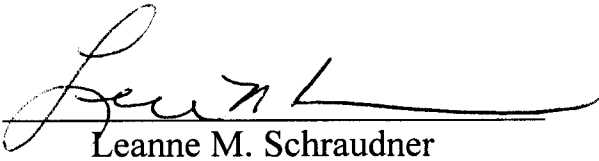
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 18, 2010, a true and correct copy of the foregoing Appellees Walkers' Brief in Response to Motion to Strike was duly served on the following by depositing the same in the U.S. mail, postage prepaid, addressed as indicated:

James H. Goetz
Bonnie L. Jarrett
Goetz, Gallik & Baldwin, P.C.
PO Box 6580
Bozeman, MT 59771-6580

Karl Knuchel
Attorney at Law
PO Box 953
Livingston, MT 59047

Schraudner & Hillier, PLLC

By: 
Leanne M. Schraudner